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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON, JUDGE

MARC SILVER, HEATHER PEFFER,)
and ALEXANDER HILL,)
individually and on behalf of)
all others similarly situated,)

Plaintiffs,)

VS.)

BA SPORTS NUTRITION, LLC,)

Defendant.)

No. C 20-0633 SI

San Francisco, California
Friday, September 4, 2020

TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS

APPEARANCES: (via Zoom Video Conferencing)

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(Appearances continued on next page)

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Official Reporter - U.S. District Court

APPEARANCES: (continued via Zoom Video Conferencing)

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Friday - September 4, 2020

10:34 a.m.

P R O C E E D I N G S

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THE CLERK: Calling civil action 20-633, Silver, et al. versus BA Sports Nutrition, LLC.

Counsel, please state your appearances for the record, beginning with the plaintiff.

MR. KING: Good morning, Your Honor. For plaintiffs, Lawrence King, Maia Kats and Mario Choi. Ms. Kats will be presenting our argument today.

THE COURT: Good morning.

MR. BORDEN: Good morning, Your Honor. Matt Borden and Tracy Zinsou on behalf of the defendant.

THE COURT: Good morning.

Well, welcome. This is the motion to dismiss the First Amended Complaint. I've read your papers, which were extremely vitriolic. I find that off-putting, and I hope that in future you can make them less so. The *ad hominem* attacks are not useful. These are hard enough questions without having to deal with such childish accusations. So, please, calm down in the future.

I have some questions specifically for you, and then you can add whatever you would like to your papers.

But, in the first instance for defendants, the papers do not clearly address plaintiff's separate, I guess, now

1 standalone allegations that the fruit-based labeling is
2 deceptive separate from whether there's a violation of FDA
3 regulation. So what is your position on that?

4 **MR. BORDEN:** Thank you, Your Honor.

5 The fruit-based regulation -- well, putting the
6 fruit-based regulation aside, the product obviously does not
7 contain fruit. No sports beverages contain fruit whatsoever.

8 **THE COURT:** How do we know that?

9 **MR. BORDEN:** Well, they were only able to come up
10 with one example of a sports beverage that contains fruit, and
11 that is the Gatorade Juiced product. It's been on the market
12 maybe a couple of months. It specifically says "juice" in the
13 name because it's calling attention to the fact that this thing
14 has juice in it, and it's trying to distinguish itself from
15 BodyArmor, from Powerade, from all the other Gatorade products.
16 None of these products have juice in it.

17 **THE COURT:** Why do they put fruits on the label?

18 **MR. BORDEN:** Because that's the flavor of the
19 product. And everybody -- everybody understands that.
20 These -- these plaintiffs bought the product they've alleged
21 repeatedly. They had to have understood that it did not have
22 any fruit in it.

23 It's -- it's very different from a situation where you
24 would expect something to have fruit in it, and that's where
25 the regulation applies. And, you know --

1 **THE COURT:** How do we know, by the way, what people
2 expect to have in what? That's a concern I have for both of
3 you about the regulation.

4 Are there cases that say, well, this is how you know
5 what -- what product is expected to have what ingredients in
6 it?

7 I'm not a big sports drink person, so when you say no
8 sports drinks have fruit in them, I don't know. How do we know
9 that?

10 **MR. BORDEN:** Well, you can also see from the
11 complaint itself they have all these pictures of in-store
12 displays. And it's not in the refrigerated section like a
13 fruit juice.

14 And, I mean, you can just -- you can look at the physical
15 product and see that it doesn't have fruit in it. And if you
16 buy it repeatedly and you drink it, you also know that it
17 doesn't have fruit in it. I don't think anybody would -- would
18 think that it had fruit in it.

19 And, also, if you look at the label itself -- and I know
20 that you're familiar with it because you pasted it into the
21 last decision -- it says on it "natural flavors and
22 sweeteners." And it says it on the area of the label with the
23 coconut water and the electrolytes and the other -- the other
24 representations that plaintiffs said that they read and relied
25 on.

1 So you know that they had to have read that it said
2 "natural flavors and sweeteners." That is -- that's another
3 way that we know that these plaintiffs understood that it
4 doesn't have fruit in it.

5 **THE COURT:** Natural flavors means it doesn't have
6 fruit in it?

7 **MR. BORDEN:** It has natural flavors. I mean, it says
8 that it's flavored. It doesn't say, you know, contains fruit.
9 I mean, if you read the ingredients you know exactly what's in
10 the product.

11 **THE COURT:** Plaintiffs, do you have any cases that
12 tell us how we know what's reasonably normally expected to be
13 in a product?

14 **MS. KATS:** Good morning, Your Honor.

15 Well, I think that's precisely the point, that we can't as
16 a matter of law assume that we know what plaintiffs think here
17 when there is a debate about it.

18 And we know what our plaintiffs thought. We know what the
19 FDA says about how it should not be deceptive, which is that --
20 defense counsel held up a can of BodyArmor, a bottle, that was
21 not very representative of most of them.

22 If you look at our opposition, you will see that they
23 plaster it in images of fruit. And they name the drink after
24 fruit for a reason, because they want people to think that
25 there are fruits in them.

1 And this was precisely why Gatorade and PepsiCo did the
2 right thing when they inferred that there were fruits in them
3 when they weren't there. And in characterizing amount they
4 used the word "flavor."

5 When Coke Cherry -- nobody thinks that that's a real fruit
6 juice under Mr. Borden's analysis -- when they put a picture of
7 a cherry on the front of the label they say "flavored."

8 The regulation is clear as day, Your Honor. There is no
9 exemption. When the FDA wants to exempt someone from a
10 regulation they so specify it. A sports drink is a food. And,
11 therefore, they must follow the FDA regulation because they
12 intended for plaintiffs and consumers to think this.

13 Now, what they actually think we just -- that's -- that's
14 perhaps a subject of discovery and a survey on consumer
15 perceptions, but it's not something, clearly, that can be
16 thrown out, in my view, Your Honor, with all due respect, as a
17 matter of law.

18 **THE COURT:** Do you think -- do you think natural
19 flavors and naturally flavored are two different things?

20 **MS. KATS:** I think that that is a red herring, Your
21 Honor. Defense counsel spent a page and a half on that in
22 their brief. That is not the issue.

23 The issue here is that the whole bottle is plastered with
24 fruits; right. They're there for a reason: because people
25 think fruits are healthy. And their name, the nomenclature,

1 the whole naming protocol is fruit-based.

2 And then everyone knows that vitamins come from fruits.
3 And there's vitamins all over this. Nowhere does it say that
4 this is artificially fortified. Their artificial
5 ingredients -- all of these vitamins are artificially fortified
6 here.

7 And so this is -- this is case law textbook deceptive
8 in -- in our view, Your Honor.

9 **THE COURT:** Casebook. That's why I keep asking, do
10 you have any cases that will say, well, in a sports drink you
11 would or would not common -- what is it, commonly expect it to
12 contain a flavor?

13 **MS. KATS:** Well, Your Honor, there is no separate
14 category for sports drinks. They are a food. They are food
15 like any other food. They fall under this regulation. To be
16 exempt it would have to be expressed.

17 And you have BodyArmor's arch competitor here, Gatorade,
18 Gatorade, when it pictures fruits and it refers to fruit but it
19 doesn't contain those fruits, uses the word "flavored" so as
20 not to be deceptive.

21 With all due respect, I think the question should be
22 flipped. Where is the authority? Given that defendant is
23 moving to dismiss this as a matter of law, where is the
24 authority saying they're exempt from this regulation? There is
25 none. It's made up, Your Honor.

1 **THE COURT:** Mr. Borden.

2 **MR. BORDEN:** Your Honor, the FDA regulations
3 specifically say that you can use the images of fruits to
4 convey that your product is fruit flavored. And that's in the
5 regulation itself. And all that BodyArmor is doing is
6 following the regulation.

7 And, as you point out, even if the regulation were to
8 apply, it's a distinction without a difference, this idea of
9 naturally flavored versus natural flavors. It's -- it's the
10 same thing, and it's a quarter inch away.

11 They read this and they understood the precise information
12 that the FDA requires people to disclose on their labels. And
13 so it's -- there's no way that they could plausibly assert that
14 they were misled, because BodyArmor discloses the very
15 information that the FDA requires.

16 **THE COURT:** Do you have any cases that talk about
17 pictures of fruits on labels?

18 **MR. BORDEN:** I'm trying to think. I do not think I
19 have a case with a picture of a fruit on a label.

20 I do think that in the *Gerber* case there was pictures of
21 fruit on the label. The product was called Fruit Juice Snacks.
22 And it didn't -- it didn't have the pictures of the fruits
23 that -- it had fruit juice, but it didn't have the pictures of
24 the fruits that were on the front of the label. So in that
25 case I understand that the Ninth Circuit said there was

1 potential that it could be misleading.

2 **THE COURT:** Was there any fruit in fruit juice on
3 *Gerber*?

4 **MR. BORDEN:** Yeah, there was fruit in fruit juice. I
5 think there was grape juice and apple juice, but it didn't
6 have -- you know, there were other fruits on the label of the
7 product, and it didn't have those fruits. And that's what it
8 found to be misleading. They were using, sort of, a cheaper
9 fruit product than -- than maybe what consumers would expect
10 from seeing an image on the front of a product that was called
11 Fruit Juice Snacks.

12 This is not called fruit juice snacks. This is
13 banana-strawberry flavor. There's no banana juice. Nobody
14 thinks there's a banana juice product.

15 And, you know, the names -- I mean, some of the names like
16 "tropical fruit punch," I mean, these are not things that are
17 actual real fruits. And -- and a disclosure --

18 **THE COURT:** Pardon me? What did you just say?
19 Tropical fruit punch?

20 **MR. BORDEN:** Yes.

21 **THE COURT:** Is not real fruit?

22 **MR. BORDEN:** Well, it's -- like what fruit would --
23 would a person expect to be --

24 **THE COURT:** Mangoes and guavas and papayas. No?

25 **MS. KATS:** That's what's pictured, Your Honor.

1 **MR. BORDEN:** The -- there's coconut water in the
2 product. That is the -- that is what the product's base is and
3 that's what it says. And it has all the flavors that -- that
4 are depicted on the label.

5 There's just no -- I mean, it says natural flavors and
6 sweeteners in the ingredients. It says, you know, natural
7 flavors right on the side. It -- this product does not purport
8 to be a fruit juice in any way.

9 **THE COURT:** Can you tell me this one? It says
10 "natural flavors." What does that mean? What is a natural
11 flavor? Like banana, what's a natural flavor banana?

12 **MR. BORDEN:** I don't know exactly what they use.
13 Typically, you would buy it from someone who is a flavor
14 manufacturer who will say -- give you a certificate of
15 authenticity that says this is natural banana flavor.

16 **THE COURT:** What does natural -- what does natural
17 mean in that context?

18 **MR. BORDEN:** Presumably it's not made from a
19 synthetic product.

20 **THE COURT:** But it's not made from a banana?

21 **MR. BORDEN:** I'm, frankly, not sure. But I -- but I
22 imagine that -- I mean, I'm more familiar with the concept of
23 vanilla. So vanilla flavor, for example, can be Vanillin is
24 what gives it the flavor, and that can be synthesized without
25 using the actual vanilla bean.

1 So I'm assuming that you could have similar things for
2 other flavors and fruit flavors as well. Many things are fruit
3 flavored.

4 **THE COURT:** But not -- the fruit flavors are not
5 produced from fruit?

6 **MR. BORDEN:** I actually don't know. It could be that
7 you could use the fructose from a grape to derive banana
8 flavor. I don't really know.

9 **THE COURT:** Ms. Kats, you were gasping there. Is
10 there anything you --

11 **MS. KATS:** I would just like to point out two things
12 in response.

13 Mr. Borden, I think, frankly, slipped when he said that
14 this is banana-strawberry flavor. That's precisely our point.
15 It should say "flavor" and not "banana-strawberry."

16 And if an expert in food law doesn't know what it means,
17 if it doesn't mean the fruit, how does your average Joe or Jane
18 in the supermarket know what it's supposed to mean? They
19 don't. And that's why we need discovery to establish that
20 through a consumer survey, Your Honor.

21 **THE COURT:** Okay. I think I had one more --

22 **MR. BORDEN:** Yeah, just -- sorry, Your Honor.

23 **THE COURT:** Go ahead.

24 **MR. BORDEN:** One more quick point is, the "natural
25 flavors" is also defined by the FDA.

1 **THE COURT:** What do they call it?

2 **MR. BORDEN:** I can look up the definition and provide
3 it to you. Why don't we continue with the hearing. Somebody
4 will send it to me.

5 **THE COURT:** Okay. I had one more question.

6 Plaintiffs rely on *Fisher v. Monster Beverage*, where they
7 advertise that their drinks hydrated like a sports drink, and
8 the drinks had a lot of caffeine.

9 How is *Fisher* distinguishable from your case, Mr. Borden?

10 **MR. BORDEN:** Sure. So our drink -- *Fisher* involved
11 an energy drink like Red Bull or one of those kind of drinks
12 that has a lot of caffeine and has a lot of sugar in it. And
13 what it said was it hydrates like an energy drink. I mean,
14 like a -- like a sports drink.

15 **THE COURT:** Like a sports drink.

16 **MR. BORDEN:** Pardon me, yes.

17 And -- and our product is a sports beverage. And it says
18 "superior hydration." And there's no -- as you pointed out in
19 the prior order, there's no comparison to anything. There's no
20 way to measure superior hydration versus anything else.
21 Whereas, the Court in *Fisher* said "hydrates like a sports
22 drink" is something that we can -- we can think about because
23 this -- it's a comparison to something actual.

24 And they were also concerned that the amount of caffeine
25 that was in the beverage in that instance was actually

1 dehydrating and was a concern.

2 As the Court pointed out in its prior order, there's
3 nothing that, you know, says that BodyArmor doesn't hydrate.
4 There's no allegations that it -- it's not an effective
5 hydration beverage. It doesn't have any caffeine in it.
6 And -- and it doesn't make any comparison to any other product.

7 And so when you just have this word "superiority" lurking
8 out there -- this is what your prior order said, this is what
9 the case law says -- you have to say this is superior because
10 we have a study that shows that we have, you know, better
11 hydration than Gatorade, or tests show that our product is more
12 superior than water because -- you know, hydration studies or
13 some kind of reference to an actual study to something that is
14 a real comparator and a basis for comparing so that you have a
15 statement that can be proven true or false.

16 "Superior hydration" cannot be proven true or false.
17 "Hydrates like a sports beverage" could be, you know,
18 potentially measured by looking at how sports beverages hydrate
19 and comparing it to the way that the product there hydrates.
20 And so that's the distinction between *Fisher* and our case.

21 **THE COURT:** All right. Thank you.

22 Ms. Kats, anything?

23 **MS. KATS:** Well, I have a lot to say, Your Honor,
24 about *Fisher v. Monster*, but mostly I'm perplexed by where
25 there was any sort of scientific study alleged in *Fisher versus*

1 *Monster*. There isn't.

2 There is no requirement of making a comparison that is
3 coupled on a label with a scientific reference or a study.
4 That is just something that has been manufactured, with all due
5 respect.

6 But in *Fisher*, what *Fisher* stands for is that the basic
7 tenets of UCL and GBL deception claims apply equally to the
8 hydration claims. Simply because the word "hydration" is in
9 there it doesn't suddenly take it out and put it into a
10 different category of legal claims. It just doesn't.

11 And what the Court, the Ninth Circuit in *Fisher* did was to
12 look at the claim "hydrates" or "rehydrates like a sports
13 drink." And when it reversed the trial court, it found that
14 there were two bases that plaintiffs stated plausible claims.
15 The first was because they alleged that *Monster* lacked certain
16 ingredients that sports drinks have. And the second -- and
17 those scientific studies there. Second and independent of the
18 first is because *Monster* had an ingredient that links with
19 harm, according to plaintiffs.

20 That's the same as what plaintiffs are doing here.
21 They're alleging that, as one of their claims anyway, that the
22 added sugar links with harm such that this is not superior and
23 that superior hydration is not good for you.

24 It also makes clear, *Fisher* makes clear that hydration
25 is -- and this is what the NAD found in analyzing these claims.

1 Hydration is just -- we're not claiming here that BodyArmor is
2 actionable, the advertising, because it's a super drink. That
3 standing alone would be puffery.

4 Plaintiffs are claiming that it's actionable because it's
5 "superior hydration." And hydration is a term with inordinate
6 meaning to consumers of sports drinks. Everyone knows this.
7 BodyArmor knows it. PepsiCo and Gatorade knows it. The
8 Attorney General of California knows it. The NAD knows it.
9 The CDC, the FDA, everyone is talking about what sports drinks
10 mean.

11 I'll say something else about *Fisher*. It makes clear that
12 there's no requirement on plaintiffs, in a hydration claim, of
13 proving falsity. There the Court roundly rejected this notion
14 that plaintiff, which is just absolutely backwards, has a
15 burden to disprove defendant's hydration claims. They don't.

16 And in the Court's own words:

17 "Although the statements upon which plaintiffs relied
18 were not strictly false, it is plausible that they were
19 misleading, which is all California law required."

20 And so the claims here really echo those in *Monster*.

21 Plaintiffs are claiming that the -- the defendant's marketing
22 is misleading because superior hydration, whether alone or in
23 the context which defendant continually ignores, in the context
24 of all these other prominent labeling claims that tether the
25 superior hydration characteristic to defendant's proprietary

1 formula, the vitamin content, the fruits, the natural
2 flavoring. And not just that, Your Honor, but they on the
3 label exhort consumers to ditch their outdated sports drinks
4 and upgrade from their outdated sports drinks to Gatorade --
5 I'm sorry, to BodyArmor.

6 And so plaintiffs are saying they got the message. That's
7 all they're saying. They got the message that BodyArmor's CEO
8 and founder wanted them to get, that this is superior at
9 hydrating, that it's more modern than Gatorade's outdated,
10 antiquated formula, that it does better at hydrating them. And
11 that this is riddled with omissions if not just false. And
12 that it doesn't mean what they believed it to mean, which is
13 that this was verifiable, objective, measurable superiority for
14 which they paid a majorly handsome price differential, Your
15 Honor. It's more expensive.

16 And so, again, this is material to plaintiffs because
17 plaintiffs believe that hydration causes an effect. That
18 effect is what? That effect is that their workout's going to
19 be better, they're not going to have cramping, they're not
20 going to have headaches, their fatigue will be less.

21 And, as BodyArmor knows, there's just no basis for that
22 advertising. And -- but plaintiffs believed it. They got the
23 message. They know what BodyArmor was trying to advertise.
24 They heard it. They believed it. They relied on it. They
25 paid a price premium. They bought the thing in the first

1 instance.

2 All this is so much more than what plaintiffs in *Fisher*
3 alleged, Your Honor. And the Court there said they had more
4 than met their burden.

5 **THE COURT:** All right. Thank you.

6 **MR. BORDEN:** So, Your Honor, can I just --

7 **THE COURT:** Yes.

8 **MR. BORDEN:** -- refer you back? And this is part of
9 the problem here. And this is page 9 of your order dismissing
10 the puffery claims here.

11 These are -- I'm quoting the Court's order. These are
12 vague, general -- pardon me. "These are general vague
13 statements about product superiority." And then you go on to
14 say, quote, Plaintiffs do not allege that BodyArmor is not, in
15 fact, hydrating. For example, plaintiffs do not allege that
16 BodyArmor is dehydrating. In addition, BA has not made a
17 specific measurable advertisement claim of product superiority
18 based on product testing.

19 And it's the "based on product testing" part. You go on
20 to cite about 15 cases. There's Ninth Circuit cases talking
21 about all sorts of measurable things like brightness, gas
22 mileage -- that's a District Court case by Judge Koh --
23 computer processor speed, all these things that can be tangibly
24 measured. And, you know, by saying superior gas mileage to a
25 previous model's that was puffery.

1 You need to -- in order to have something that is not
2 puffery involving that term "superiority," which is just this
3 vague generalized thing that people say about their products,
4 and they're allowed to say about their products. Look, this is
5 a -- BodyArmor is a good product. And they're allowed to have
6 athletes advertise it. They're allowed to say that it provides
7 superior hydration because it's a good product. They're
8 allowed to say good things about their products.

9 And this is one of the other sort of difficulties in this
10 case. And we haven't really talked about the halo claims, and
11 I'm not sure the Court even wants to, but, I mean, I'm happy to
12 address them if you want.

13 But it's very troubling when you make a product and you
14 have these amorphous allegations where they're just trying to
15 take any advertising language and say that it's somehow
16 misleading. And their theories, you know, keep changing and --
17 and they come up with new ones.

18 And none of it's misleading. This is a -- everybody
19 understands that these energy drinks are -- are -- I mean,
20 these sports drinks are used to replenish your body when you're
21 engaged in physical activity. That's how everybody uses 'em.
22 And it is a really good product for that.

23 And it is all natural. It's -- in terms of its flavors
24 and colors. It is made with coconut water and has a great deal
25 of potassium, more than its competitors. And that's how it's

1 differentiated itself in the market.

2 I did have someone pull the reg for you. Artificial
3 flavors. And it's 21 C.F.R. 501.22(a)(1) -- or (a)(3).

4 **THE COURT:** Would you start that whole thing over. 21
5 C.F.R. what?

6 **MR. BORDEN:** 501.22(a)(3). And I can read it to you.

7 "The term natural flavor or natural flavoring means
8 the essential oil, oleoresin, essence or extractive,
9 protein hydrolysate, distillate, or any product of
10 roasting, heating or enzymolysis" -- my apologies to the
11 court reporter -- "which contains the flavoring
12 constituents derived from a spice, fruit or fruit juice,
13 vegetable or vegetable juice, edible yeast, herb, bark,
14 bud, root..."

15 I don't need to read you the whole thing. But that's the
16 general flavor of it, if you will.

17 **THE COURT:** Well, now we know. Thank you.

18 **MR. BORDEN:** Well --

19 **THE COURT:** They didn't mention anything about bananas
20 though.

21 **MR. BORDEN:** It may be -- it may be coming down the
22 pike. I don't know. It's a long -- it's a long regulation.

23 But, you know, in your last order you cited about 15
24 cases, you know, for this principle that there has to be some
25 kind of real comparator. So, I mean, this is a recycling of

1 the same -- same arguments. I mean, I can walk through all
2 the --

3 **THE COURT:** Well, you know, the thing that strikes me
4 as different this time from the last time is the heavy emphasis
5 on the pictures of the fruits on the labels and the conjunction
6 of that to all the other things you're talking about.

7 That -- that's an issue that I don't -- I didn't at least
8 recognize being so forcefully asserted before, and I just --
9 I'm not sure that I've heard a real response to that from you.

10 **MS. KATS:** Your Honor --

11 **MR. BORDEN:** Well, so the idea of fruit somehow
12 giving rise to superior hydration doesn't -- I mean, that's
13 not -- I don't understand why you would say because it has a
14 picture of a slice of orange on it you would think that it
15 would be any more hydrating than anything else.

16 And it still doesn't answer the question of a comparison,
17 right. There's still no comparison to superior hydration. And
18 that's the -- I mean, that's the -- the big fault is that you
19 can't -- unless you're saying that it's superior to something,
20 and unless you're saying why it's superior to something -- I
21 mean, it could be superior hydration because it has potassium
22 in it. It could be superior hydration for any number of
23 reasons. Because it tastes better. Because it's more natural.
24 Because it doesn't -- it's not that bright neon Yellow Dye No.
25 5 Gatorade.

1 It is not a comparison to anything. And some of these
2 plaintiffs even said they thought it was a comparison to water.
3 So -- so it's just not a comparison.

4 You know, you can say -- if I say, you know, I'm the best
5 lawyer in the world, you know, I think everybody would take it
6 with somewhat of a grain of salt and understand that I'm not
7 really saying, you know, going back since the beginning of time
8 that I'm better than every other lawyer in the world in some
9 kind of objective and measurable way. I'm just saying I'm
10 good.

11 **THE COURT:** Well, if you say "I'm the best lawyer in
12 the world" nobody would believe you because there wouldn't --
13 there wouldn't be a way to assess that. But it wouldn't be
14 noncomparative. It would be comparative.

15 **MR. BORDEN:** Well, yes, I suppose so.

16 And there are some -- some comparisons that -- and in what
17 way would I be the best lawyer in the world? Maybe I am the
18 best lawyer in the world for, you know, like forgiving clients
19 for payments. Or maybe I'm the best lawyer in the world for,
20 you know, handholding clients, and maybe it's not, you know, in
21 the courtroom itself.

22 There's lots of ways you could be the best lawyer in the
23 world. And that's one of those sort of vague statements. And
24 I agree that nobody would believe me. But superior hydration
25 doesn't even have a comparator on there. And that's why you've

1 seen these cases. I mean, they're unable to cite any case
2 with --

3 **THE COURT:** Well, there's inferior, which means worse
4 than average; right? And then there's superior, which means
5 better than average; right?

6 **MR. BORDEN:** Average what? You still have to --

7 **THE COURT:** How about hydration?

8 **MS. KATS:** Your Honor, may I?

9 **THE COURT:** Sure. But we need to wrap this up pretty
10 quick.

11 **MS. KATS:** That's why I'm trying to get a word in
12 here.

13 So if Mr. Borden -- I think the First Amended Complaint is
14 different from the complaint, the original complaint in many
15 ways beyond just the fruit. We have laid out very clearly why
16 plaintiffs' claims are reasonable, whether it's NAD's ruling
17 finding that their perceptions as pled are reasonable, or the
18 California Attorney General or the FDA in the jelly bean rule
19 saying don't fortify junk food. Sugar food's included.

20 But if I may, just responding to Mr. Borden's statement
21 that if I say I'm the best lawyer in the world what does that
22 mean? I may be in some ways.

23 Well, that's the point here. BodyArmor is saying that
24 it's superior, and then it spells out conspicuously on the
25 label why it's superior. It has a comparator in addition to

1 that.

2 Now, we don't even have to get to the comparator though.
3 But all of these vitamins, they're saying, are what make it
4 superior. And I'm reading right now. It's the sports drinks
5 for today's athlete, providing superior hydration by combining
6 all of these things. So potassium, the various vitamin levels,
7 all of that. And then it goes on to say, on the comparator
8 front, which is not required but definitely here, "It's time to
9 ditch your outdated sports drink and make the switch to
10 BodyArmor."

11 That gives meaning to superior hydration, Your Honor. And
12 defendant would like to pretend that the words "superior
13 hydration" -- we definitely believe they're actionable because
14 hydration is a term with meaning. And it is studied again and
15 again by scientists as to how to get the best hydration. And
16 sports people know that, Your Honor. We've cited infinite
17 research on hydration in sports drink.

18 But more than that, these words are not in abstract. They
19 don't appear in a vacuum. You have to look at it in context.
20 And that's where the FAC differs from the original complaint.

21 And we thought that the original complaint was
22 deficient -- was sufficient. Your Honor found it deficient.
23 So we went back and we filled in all the details. We filled in
24 all the other claims on the bottom.

25 It's just nonsense to say that this was meant -- had no

1 meaning. As the NAD found, one reasonable consumer takeaway
2 from BodyArmor's marketing is that the product provides better
3 hydration. Hydration is not a subjective product
4 characteristic. Consumers understand that sports drinks are
5 intended to replenish electrolytes. It would be reasonable for
6 consumers to believe that the claim "better hydration" is an
7 objective claim about a product characteristic.

8 That is from the industry expert on advertising, Your
9 Honor. If they can believe that, how is it unreasonable that
10 plaintiffs believe that?

11 **THE COURT:** All right. Thank you, all, very much.
12 This matter will be submitted and we will get back to you
13 presently.

14 Do we have other dates right now?

15 **MS. KATS:** Your Honor asked us to submit the CMC
16 statement so we --

17 **THE COURT:** For today?

18 **MS. KATS:** Yes.

19 **THE COURT:** Well, I think we should probably just
20 continue that CMC to, like, three weeks from now.

21 Teddy? Teddy, what would that be?

22 **THE CLERK:** September 25th.

23 **THE COURT:** Are you available on Friday,
24 September 25th, at about 3:00?

25 **MS. KATS:** Yes, Your Honor.

1 **MR. BORDEN:** Yes, Your Honor.

2 **THE COURT:** Okay. And if the time changes, we'll let
3 you know. But right now we'll stick it for 3 o'clock on that
4 date.

5 All right. Thank you very much. The matter will be
6 submitted.

7 **MS. KATS:** Thank you.

8 **MR. BORDEN:** Thank you very much, Your Honor.

9 (At 11:10 a.m. the proceedings were adjourned.)

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12 **CERTIFICATE OF REPORTER**

13 I certify that the foregoing is a correct transcript
14 from the record of proceedings in the above-entitled matter.

15 DATE: Thursday, September 10, 2020

16
17 *Katherine Sullivan*
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19 _____
20 Katherine Powell Sullivan, CSR #5812, RMR, CRR
21 U.S. Court Reporter
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